

DOUGLAS H. MEAL (*admitted pro hac vice*)
dmeal@orrick.com
REBECCA HARLOW (CA BAR NO. 281931)
rharlow@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: +1 415 773 5700
Facsimile: +1 415 773 5759

Attorneys for Defendants
ZOOSK INC. AND SPARK NETWORKS SE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JUAN FLORES-MENDEZ, an individual and
AMBER COLLINS, an individual, and on
behalf of classes of similarly situated
individuals,

Plaintiffs,

v.

ZOOSK, INC., a Delaware corporation; and
SPARK NETWORKS SE, a German
corporation,

Defendants.

Case No. 3:20-cv-4929-WHA

**DEFENDANT ZOOSK, INC.'S
ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFFS' FIRST
AMENDED CLASS ACTION
COMPLAINT**

Judge: The Honorable William Alsup

1 Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant Zoosk, Inc.
2 (“Zoosk”) hereby files its answer to Plaintiffs’ First Amended Class Action Complaint, dated
3 October 30, 2020 (the “Complaint”), as modified by the Court’s January 30, 2021 Order re Motions
4 to Dismiss and Request for Discovery, as set forth below. Any allegations in the Complaint not
5 expressly admitted herein are denied. Moreover, Zoosk denies any factual allegations contained in
6 the headings of the Complaint unless specifically admitted herein.

7
8 1. To the extent the allegations in paragraph 1 merely purport to describe a page on
9 Zoosk’s website and an April 16, 2014 Form S-1 filed by Zoosk, Zoosk states that the website and
10 Form S-1 are the best source of their full content and context and, to the extent such allegations do
11 not accurately represent their full content and context, Zoosk denies the allegation in paragraph 1.

12 2. Zoosk denies the allegations in the first sentence of paragraph 2. Zoosk states that
13 it lacks information or knowledge sufficient to form a belief as to the truth of the allegation in the
14 second sentence of paragraph 2 and, therefore, denies the same.

15 3. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
16 the truth of the allegation in paragraph 3 and, therefore, denies the same.

17 4. To the extent the allegation in paragraph 4 merely purports to describe an article in
18 WIRED, Zoosk states that the article is the best source of its full content and context and, to the
19 extent such allegations do not accurately represent its full content and context, Zoosk denies the
20 allegation in paragraph 4. To the extent that a further response to the allegation in paragraph 4 is
21 required, Zoosk states that it lacks information or knowledge sufficient to form a belief as to the
22 truth of the allegation in paragraph 4 and, therefore, denies the same.

23 5. To the extent the allegation in paragraph 5 merely purports to describe Zoosk’s June
24 3, 2020 notice to consumers, Zoosk states that the notice is the best source of its full content and
25 context and, to the extent such allegations do not accurately represent its full content and context,
26 Zoosk denies the allegation in paragraph 5.

27 6. Zoosk admits that on June 3, 2020, it provided a notice to certain Zoosk users. To

1 the extent the allegation in paragraph 6 merely purports to describe Zoosk's June 3, 2020 notice to
2 said Zoosk users, Zoosk states that the notice is the best source of its full content and context and,
3 to the extent such allegations do not accurately represent its full content and context, Zoosk denies
4 the allegation in paragraph 6.

5 7. To the extent the allegation in paragraph 7 merely purports to describe Zoosk's June
6 3, 2020 notice to certain Zoosk users, Zoosk states that the notice is the best source of its full content
7 and context and, to the extent such allegations do not accurately represent its full content and
8 context, Zoosk denies the allegation in paragraph 7. Zoosk denies any remaining allegations in
9 paragraph 7.

10 8. Zoosk denies the allegation in the first sentence of paragraph 8 that the notice Zoosk
11 provided to certain Zoosk users entitled "Notice of Data Security Event" was sent on May 28, 2020.
12 Zoosk admits the allegation in the first sentence of paragraph 8 that it sent certain Zoosk users a
13 notice entitled "Notice of Data Security Event" and that such notice included a phone number for
14 customer inquiries. The remaining allegations in paragraph 8 set forth legal conclusions, to which
15 no response is required. To the extent the allegations in the second and third sentences of paragraph
16 8 merely purport to quote Cal. Civil Code § 1298.82, Zoosk states that the statute is the best source
17 of its full content and context and, to the extent such allegations do not accurately represent its full
18 content and context, Zoosk denies the allegation in paragraph 8.

19 9. The allegations in paragraph 9 and footnote 7 thereto set forth legal conclusions, to
20 which no response is required. To the extent the allegations in paragraph 9 and footnote 7 thereto
21 merely purport to describe or quote the CCPA, Zoosk states that the statute is the best source of its
22 full content and context and, to the extent such allegations do not accurately represent its full
23 content and context, Zoosk denies the allegation in paragraph 9 and footnote 7 thereto. To the
24 extent that a further response to the allegations in paragraph 9 is required, Zoosk denies the same.

25 10. The allegation in paragraph 10 sets forth legal conclusions, to which no response is
26 required. To the extent the allegation in paragraph 10 merely purports to describe or quote the
27 CCPA, Zoosk states that the statute is the best source of its full content and context and, to the

1 extent such allegations do not accurately represent its full content and context, Zoosk denies the
2 allegation in paragraph 10. To the extent that a further response to the allegations in paragraph 10
3 is required, Zoosk denies the same.

4 11. The allegations in paragraph 11 and footnote 8 thereto set forth legal conclusions,
5 to which no response is required. To the extent the allegations in paragraph 11 and footnote 8
6 thereto merely purport to describe or quote the CCPA, Zoosk states that the statute is the best source
7 of its full content and context and, to the extent such allegations do not accurately represent its full
8 content and context, Zoosk denies the allegations in paragraph 11 and footnote 8 thereto. To the
9 extent that a further response to the allegations in paragraph 11 is required, Zoosk denies the same.

10 12. To the extent the allegation in the first sentence of paragraph 12 merely purports to
11 describe the notice entitled “Notice of Data Security Event” that Zoosk sent to certain Zoosk users,
12 Zoosk states that such notice is the best source of its full content and context and, to the extent such
13 allegations do not accurately represent its full content and context, Zoosk denies the allegation in
14 the first sentence of paragraph 12. To the extent a further response to the allegation in the first
15 sentence of paragraph 12 is required, Zoosk denies the same. Zoosk states that it lacks information
16 or knowledge sufficient to form a belief as to the truth of the allegation in the second sentence of
17 paragraph 12 and, therefore, denies the same.

18 13. The allegation in paragraph 13 sets forth legal conclusions, to which no response is
19 required. To the extent that a further response to the allegation in paragraph 13 is required, Zoosk
20 denies the same.

21 14. The allegation in the first sentence of paragraph 14 sets forth legal conclusions, to
22 which no response is required. To the extent that a further response to the allegation in the first
23 sentence of paragraph 14 is required, Zoosk denies the same. To the extent the allegations in the
24 second sentence of paragraph 14 merely purports to describe Zoosk’s notice entitled “Notice of
25 Data Security Event” that Zoosk sent to certain Zoosk users, Zoosk states that such notice is the
26 best source of its full content and context and, to the extent such allegations do not accurately
27 represent its full content and context, Zoosk denies the allegations in the second sentence of
28

1 paragraph 14. The allegation in the third sentence of paragraph 14 sets forth legal conclusions, to
2 which no response is required. To the extent that a further response to the allegation in the third
3 sentence of paragraph 14 is required, Zoosk denies the same. Zoosk states that it lacks information
4 or knowledge sufficient to form a belief as to the truth of the allegation in the fourth sentence of
5 paragraph 14 and, therefore, denies the same.

6 15. The allegation in paragraph 15 sets forth legal conclusions, to which no response is
7 required. To the extent that a further response to the allegation in paragraph 15 is required, Zoosk
8 denies the same.

9 16. To the extent the allegations in paragraph 16 merely purports to describe Zoosk's
10 notice entitled "Notice of Data Security Event" that Zoosk sent to certain Zoosk users, Zoosk states
11 that such notice is the best source of its full content and context and, to the extent such allegations
12 do not accurately represent its full content and context, Zoosk denies the allegations in paragraph
13 16. The allegations in paragraph 16 set forth legal conclusions, to which no response is required.
14 To the extent that a further response to the allegations in paragraph 16 is required, Zoosk states that
15 it lacks information or knowledge sufficient to form a belief as to the truth of the allegation in
16 paragraph 16 and, therefore, denies the same.

17 17. Zoosk denies the allegation in paragraph 17.

18 18. Zoosk admits that Spark is its ultimate parent company. Zoosk denies the remaining
19 allegations in paragraph 18.

20 19. Zoosk denies the allegations in paragraph 19.

21 20. The allegations in paragraph 20 sets forth legal conclusions, to which no response
22 is required. To the extent that a further response to the allegations in paragraph 20 is required,
23 Zoosk denies the same and denies that it is appropriate for Plaintiffs to bring claims on behalf of
24 the purported classes.

25 21. The allegations in paragraph 21 set forth legal conclusions, to which no response is
26 required. To the extent that a further response to the allegations in paragraph 21 is required, Zoosk
27 denies the same and denies that it is appropriate for Plaintiffs to bring claims on behalf of the

1 purported classes.

2 **JURISDICTION AND VENUE**

3 22. The allegations in paragraph 22 set forth legal conclusions, to which no response is
4 required. To the extent that a further response to the allegations in paragraph 22 is required, Zoosk
5 denies that Plaintiffs have any actionable claim and denies any remaining allegations in paragraph
6 22.

7 23. The allegations in the first sentence of paragraph 22 set forth legal conclusions, to
8 which no response is required. Zoosk admits that it has conducted business in this District, but
9 denies that it maintains its principal place of business in this District. Zoosk denies that Spark
10 maintains an office in this District. To the extent that a further response to the allegations in
11 paragraph 22 is required, Zoosk denies the same.

12 24. The allegations in paragraph 24 set forth legal conclusions, to which no response is
13 required. To the extent that a further response to the allegations in paragraph 24 is required, Zoosk
14 states that it lacks information or knowledge sufficient to form a belief as to the truth of the
15 allegation in the second sentence of paragraph 24 regarding the residences of members of the
16 putative classes and, therefore, denies the same. Zoosk denies that Plaintiffs have any actionable
17 claim and denies any remaining allegations in paragraph 24.

18 **INTRADISTRICT ASSIGNMENT**

19 25. The allegations in paragraph 25 set forth legal conclusions, to which no response is
20 required. To the extent that a further response to the allegations in paragraph 25 is required, Zoosk
21 admits that it has conducted business in the counties served by this Division, has marketed and
22 advertised its business in the counties served by this Division, and has collected user information
23 in this District. Zoosk denies the remaining allegations in paragraph 25.

24 **PARTIES**

25 26. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
26 the truth of the allegations in the first, third, and fifth sentences of paragraph 26 and, therefore,
27 denies the same. Zoosk denies the allegations in the second and fourth sentences of paragraph 26.

1 context, Zoosk denies the allegations in paragraph 37.

2 38. To the extent the allegations in paragraph 38 merely purports to describe and quote
3 Zoosk's Privacy Policy, Zoosk states that the Privacy Policy is the best source of its full content
4 and context and, to the extent such allegations do not accurately represent its full content and
5 context, Zoosk denies the allegations in paragraph 38.

6 39. To the extent the allegations in paragraph 39 merely purports to describe and quote
7 Zoosk's Privacy Policy, Zoosk states that the Privacy Policy is the best source of its full content
8 and context and, to the extent such allegations do not accurately represent its full content and
9 context, Zoosk denies the allegations in paragraph 39.

10 40. To the extent the allegations in paragraph 40 merely purports to describe and quote
11 Zoosk's Privacy Policy, Zoosk states that the Privacy Policy is the best source of its full content
12 and context and, to the extent such allegations do not accurately represent its full content and
13 context, Zoosk denies the allegations in paragraph 40.

14 41. The allegation in paragraph 41 sets forth legal conclusions, to which no response is
15 required. To the extent that a further response to the allegation in paragraph 41 is required, Zoosk
16 denies the same.

17 42. The allegations in paragraph 42 set forth legal conclusions, to which no response is
18 required. To the extent that a further response to the allegations in paragraph 42 is required, Zoosk
19 denies the same.

20 43. The allegations in the first and second sentence of paragraph 42 set forth legal
21 conclusions, to which no response is required. To the extent that a further response to the
22 allegations in paragraph 42 is required, Zoosk denies the same. Zoosk denies the allegation in the
23 third sentence of paragraph 43. To the extent that a further response to the allegations in paragraph
24 43 is required, Zoosk denies the same and denies that it is appropriate for Plaintiffs to bring claims
25 on behalf of the purported classes.

26 44. Zoosk admits that Zoosk was valued at \$258 million when it was acquired by Spark.
27 The remaining allegations in paragraph 44 set forth legal conclusions, to which no response is

1 required. To the extent that a further response to the remaining allegations in paragraph 44 is
2 required, Zoosk denies the same.

3 45. The allegations in paragraph 45 set forth legal conclusions, to which no response is
4 required. To the extent that a further response to the allegations in paragraph 45 is required, Zoosk
5 denies the same.

6 46. The allegation in the first sentence of paragraph 46 sets forth legal conclusions, to
7 which no response is required. To the extent a further response to the allegation in the first sentence
8 of paragraph 46 is required, Zoosk denies the same. Zoosk admits that its business operates
9 exclusively online; denies that it has any legal obligation to protect against third-party criminal
10 attacks on any personal data Plaintiffs may have provided to it and states, in the alternative, that to
11 the extent any such obligation exists, Zoosk has the resources and knowledge necessary to meet
12 (and in fact did meet) any such obligation; and denies the remaining allegations in paragraph 46.

13 47. Zoosk denies the allegation in paragraph 47.

14 48. Zoosk admits that it became aware on May 11, 2020 of unlawful access to
15 information provided to Zoosk by certain Zoosk users in connection with becoming or being a
16 Zoosk user. Zoosk states that it lacks information or knowledge sufficient to form a belief as to the
17 truth of the remaining allegations in paragraph 48 and, therefore, denies the same.

18 49. The allegations in paragraph 49 set forth legal conclusions, to which no response is
19 required. To the extent a further response to the allegations in paragraph 49 is required, Zoosk
20 denies the same.

21 50. To the extent the allegation in paragraph 50 merely purports to describe Zoosk's
22 notice entitled "Notice of Data Security Event" that Zoosk sent to certain Zoosk users, Zoosk states
23 that such notice is the best source of its full content and context and, to the extent such allegations
24 do not accurately represent its full content and context, Zoosk denies the allegations in paragraph
25 50. Zoosk denies that it sent the notice entitled "Notice of Data Security Event" to Plaintiff Collins.
26 Zoosk further denies that it is appropriate for Plaintiffs to bring claims on behalf of the purported
27 classes.

1 51. The allegations in paragraph 51 set forth legal conclusions, to which no response is
2 required. To the extent a further response to the allegations in paragraph 51 is required, Zoosk
3 denies the same. Zoosk further denies that it is appropriate for Plaintiffs to bring claims on behalf
4 of the purported classes.

5 52. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
6 the truth of the allegation in paragraph 52 and, therefore, denies the same.

7 53. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
8 the truth of the allegation in paragraph 53 and, therefore, denies the same.

9 54. Zoosk denies the allegation in the first sentence of paragraph 54. Zoosk states that
10 it lacks information or knowledge sufficient to form a belief as to the truth of the remaining
11 allegations in paragraph 54 and, therefore, denies the same.

12 55. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
13 the truth of the allegation in paragraph 55 and, therefore, denies the same.

14 56. To the extent the allegations in paragraph 56 merely purport to describe a GAO
15 report, Zoosk states that the report is the best source of its full content and context and, to the extent
16 such allegations do not accurately represent its full content and context, Zoosk denies the
17 allegations in paragraph 56. Zoosk states that it lacks information or knowledge sufficient to form
18 a belief as to the truth of the remaining allegations in paragraph 56 and, therefore, denies the same.

19 57. The allegations in paragraph 57 sets forth legal conclusions, to which no response
20 is required. To the extent a further response to the allegations in paragraph 57 is required, Zoosk
21 denies the same. Zoosk further denies that it is appropriate for Plaintiffs to bring claims on behalf
22 of the purported classes.

23 58. Zoosk admits that it has not offered credit monitoring services to any of the Zoosk
24 users to whom Zoosk sent the notice entitled “Notice of Data Security Event.” Zoosk denies the
25 remaining allegations in the first sentence of paragraph 58. To the extent the allegation in the
26 second sentence of paragraph 58 merely purports to describe Zoosk’s notice entitled “Notice of
27 Data Security Event” that Zoosk sent to certain Zoosk users, Zoosk states that the Notice of Data

1 Security Event is the best source of its full content and context and, to the extent such allegations
2 do not accurately represent its full content and context, Zoosk denies the allegation in the second
3 sentence of paragraph 58.

4 59. The allegations in the first and second sentences of paragraph 59 set forth legal
5 conclusions, to which no response is required. To the extent that a further response to the
6 allegations in the first and second sentences of paragraph 59 is required, Zoosk denies the same.
7 Zoosk denies the allegation in the third sentence of paragraph 59. Zoosk states that it lacks
8 information or knowledge sufficient to form a belief as to the truth of the allegations in the fourth,
9 fifth, and sixth sentences of paragraph 59 and, therefore, denies the same.

10 60. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
11 the truth of the allegation in paragraph 60 and, therefore, denies the same.

12 61. The allegations in paragraph 61 sets forth legal conclusions, to which no response
13 is required. To the extent a further response to the allegations in paragraph 61 is required, Zoosk
14 denies the same. Zoosk further denies that it is appropriate for Plaintiffs to bring claims on behalf
15 of the purported classes.

16 **CLASS ACTION ALLEGATIONS**

17 62. The allegations in paragraph 62 consist of legal conclusions and Plaintiffs'
18 characterization of their claims and terminology to which no response is required. To the extent
19 that a further response to the allegations in paragraph 62 is required, Zoosk denies the same, denies
20 that it is appropriate for Plaintiffs to bring claims on behalf of the purported Nationwide Class and
21 California Class, and denies that such classes may be certified under Rule 23 of the Federal Rules
22 of Civil Procedure.

23 63. The allegations in paragraph 63 consist of Plaintiffs' characterization of their claims
24 and terminology to which no response is required. To the extent that a further response to the
25 allegations in paragraph 63 is required, Zoosk denies the same, denies that it is appropriate for
26 Plaintiffs to bring claims on behalf of the purported Nationwide Class and California Class, and
27 denies that such classes may be certified under Rule 23 of the Federal Rules of Civil Procedure.

1 64. The allegations in paragraph 64 consist a reservation of rights to which no response
2 is required. To the extent that a further response to the allegations in paragraph 64 is required,
3 Zoosk denies the same.

4 65. To the extent the allegation in the second sentence of paragraph 65 merely purports
5 to describe Zoosk's notice entitled "Notice of Data Security Event" that Zoosk sent to certain Zoosk
6 users, Zoosk states that such notice is the best source of its full content and context and, to the
7 extent such allegations do not accurately represent its full content and context, Zoosk denies the
8 allegation in the second sentence of paragraph 65. The remaining allegations in paragraph 65 set
9 forth legal conclusions, to which no response is required. To the extent that a further response to
10 the allegations in paragraph 65 is required, Zoosk denies the same.

11 66. The allegations in paragraph 66 set forth legal conclusions, to which no response is
12 required. To the extent that a further response to the allegations in paragraph 66 is required, Zoosk
13 denies the same.

14 67. The allegations in paragraph 67 set forth legal conclusions, to which no response is
15 required. To the extent that a further response to the allegations in paragraph 67 is required, Zoosk
16 denies the same.

17 68. The allegations in paragraph 68 set forth legal conclusions, to which no response is
18 required. To the extent that a further response to the allegations in paragraph 68 is required, Zoosk
19 denies the same.

20 69. The allegations in paragraph 69 set forth legal conclusions, to which no response is
21 required. To the extent that a further response to the allegations in paragraph 69 is required, Zoosk
22 denies the same.

23 70. The allegations in paragraph 70 set forth legal conclusions, to which no response is
24 required. To the extent that a further response to the allegations in paragraph 70 is required, Zoosk
25 denies the same.

26 71. The allegations in paragraph 71 set forth legal conclusions, to which no response is
27 required. To the extent that a further response to the allegations in paragraph 71 is required, Zoosk

denies the same.

72. The allegations in paragraph 72 set forth legal conclusions, to which no response is required. To the extent that a further response to the allegations in paragraph 72 is required, Zoosk denies the same.

73. The allegations in paragraph 73 set forth legal conclusions, to which no response is required. To the extent that a further response to the allegations in paragraph 73 is required, Zoosk denies the same.

74. The allegations in paragraph 74 set forth legal conclusions, to which no response is required. To the extent that a further response to the allegations in paragraph 74 is required, Zoosk denies the same.

75. The allegations in paragraph 75 set forth legal conclusions, to which no response is required. To the extent that a further response to the allegations in paragraph 75 is required, Zoosk denies the same.

76. The allegations in paragraph 76 set forth legal conclusions, to which no response is required. To the extent that a further response to the allegations in paragraph 76 is required, Zoosk denies the same.

FIRST CAUSE OF ACTION

NEGLIGENCE

(By Plaintiffs and the Classes Against All Defendants)

77. Zoosk repeats and incorporates by reference each and every response to paragraphs 1 to 76 above.

78. The allegations in paragraph 78 set forth a legal conclusion, to which no response is required. To the extent that a further response to the allegations in paragraph 78 is required, Zoosk denies the same.

79. The allegations in paragraph 79 set forth a legal conclusion, to which no response is required. To the extent that a further response to the allegations in paragraph 79 is required, Zoosk denies the same.

1 80. The allegations in paragraph 80 set forth a legal conclusion, to which no response is
2 required. To the extent that a further response to the allegations in paragraph 80 is required, Zoosk
3 denies the same.

4 81. The allegations in paragraph 81 set forth a legal conclusion, to which no response is
5 required. To the extent that a further response to the allegations in paragraph 81 is required, Zoosk
6 denies the same.

7 82. The allegations in paragraph 82 set forth a legal conclusion, to which no response is
8 required. To the extent that a further response to the allegations in paragraph 82 is required, Zoosk
9 denies the same.

10 83. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
11 the truth of the allegation in paragraph 83 and, therefore, denies the same.

12 84. The allegations in paragraph 84 set forth a legal conclusion, to which no response is
13 required. To the extent that a further response to the allegations in paragraph 84 is required, Zoosk
14 denies the same. To the extent the allegations in paragraph 84 merely purport to describe and quote
15 Section 5 of the FTC Act, Zoosk states that the statute is the best source of its full content and
16 context and, to the extent such allegations do not accurately represent its full content and context,
17 Zoosk denies the allegations in paragraph 84.

18 85. The allegations in paragraph 85 set forth a legal conclusion, to which no response is
19 required. To the extent that a further response to the allegations in paragraph 85 is required, Zoosk
20 denies the same.

21 86. The allegations in paragraph 86 set forth a legal conclusion, to which no response is
22 required. To the extent that a further response to the allegations in paragraph 86 is required, Zoosk
23 denies the same.

24 87. The allegations in paragraph 87 set forth a legal conclusion, to which no response is
25 required. To the extent that a further response to the allegations in paragraph 87 is required, Zoosk
26 denies the same.

1 88. The allegations in the first and second sentences of paragraph 88 set forth legal
2 conclusions, to which no response is required. To the extent that a further response to the
3 allegations in the first and second sentences of paragraph 88 is required, Zoosk denies the same.
4 Zoosk admits that the FTC has purported to bring enforcement actions against businesses alleging
5 that data security practices violated Section 5 of the FTC Act and denies the remaining allegations
6 in paragraph 88.

7 89. The allegations in paragraph 89 set forth a legal conclusion, to which no response is
8 required. To the extent that a further response to the allegations in paragraph 89 is required, Zoosk
9 denies the same.

10 90. The allegations in paragraph 90 set forth a legal conclusion, to which no response is
11 required. To the extent that a further response to the allegations in paragraph 90 is required, Zoosk
12 denies the same.

13
14 **CAUSE OF ACTION TWO**

15 **DECLARATORY JUDGMENT**

16 **(On Behalf of Plaintiffs and the Nationwide Class)**

17 91. Zoosk repeats and incorporates by reference each and every response to paragraphs
18 1 to 90 above.

19 92. The allegation in paragraph 92 sets forth a legal conclusion, to which no response is
20 required. To the extent that a further response to the allegations in paragraph 92 is required, Zoosk
21 denies the same.

22 93. Zoosk admits that it still possesses whatever information was provided to it by each
23 Plaintiff and by any Zoosk user to whom Zoosk sent its notice entitled “Notice of Data Security
24 Event” in connection with his or her registration as a Zoosk user and use of Zoosk’s services. Zoosk
25 denies any remaining allegations in paragraph 93.

26 94. Zoosk states that it lacks information or knowledge sufficient to form a belief as to
27 the truth of the allegation in paragraph 94 and, therefore, denies the same.

95. To the extent the allegations in paragraph 95 merely purport to describe Zoosk's notice entitled "Notice of Data Security Event" that Zoosk sent to certain Zoosk users, Zoosk states that such notice is the best source of its full content and context and, to the extent such allegations do not accurately represent its full content and context, Zoosk denies the allegations in the second sentence of paragraph 95.

96. The allegations in paragraph 96 sets forth a legal conclusion, to which no response is required. To the extent that a further response to the allegations in paragraph 96 is required, Zoosk denies the same.

97. Zoosk denies the allegations in paragraph 97.

98. Paragraph 98 consists of Plaintiffs' description of the relief they seek, to which no response is required. To the extent that a further response to any allegations in paragraph 98 is required, Zoosk denies the allegations and additionally denies that Plaintiffs are entitled to any of the relief described in paragraph 98.

CAUSE OF ACTION THREE

VIOLATION OF THE CALIFORNIA CONSUMER PRIVACY ACT § 1798.150

(By Plaintiffs and the members of the California Class Against Defendants)

99. On December 15, 2020, Plaintiffs voluntarily withdrew their Cause of Action 3. *See* Plaintiffs' Response in Opposition to Defendants' Motion To Dismiss (ECF No. 54) at 12. As a result, Zoosk has no obligation to respond to this paragraph.

100. On December 15, 2020, Plaintiffs voluntarily withdrew their Cause of Action 3. *See* Plaintiffs' Response in Opposition to Defendants' Motion To Dismiss (ECF No. 54) at 12. As a result, Zoosk has no obligation to respond to this paragraph.

101. On December 15, 2020, Plaintiffs voluntarily withdrew their Cause of Action 3. *See* Plaintiffs' Response in Opposition to Defendants' Motion To Dismiss (ECF No. 54) at 12. As a result, Zoosk has no obligation to respond to this paragraph.

102. On December 15, 2020, Plaintiffs voluntarily withdrew their Cause of Action 3. *See* Plaintiffs' Response in Opposition to Defendants' Motion To Dismiss (ECF No. 54) at 12. As a

1 result, Zoosk has no obligation to respond to this paragraph.

2 103. On December 15, 2020, Plaintiffs voluntarily withdrew their Cause of Action 3. *See*
3 Plaintiffs' Response in Opposition to Defendants' Motion To Dismiss (ECF No. 54) at 12. As a
4 result, Zoosk has no obligation to respond to this paragraph.

5 **CAUSE OF ACTION FOUR**

6 **VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW**

7 **CAL. BUS. & PROF. CODE § 17200 – UNLAWFUL BUSINESS PRACTICES**

8 **(On Behalf of Plaintiffs and the Nationwide Class, Or In The Alternative, On Behalf of the**
9 **California Class)**

10 104. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
11 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
12 obligation to respond to this paragraph.

13 105. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
14 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
15 obligation to respond to this paragraph.

16 106. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
17 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
18 obligation to respond to this paragraph.

19 107. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
20 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
21 obligation to respond to this paragraph.

22 108. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
23 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
24 obligation to respond to this paragraph.

25 109. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order
26 re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no
27 obligation to respond to this paragraph.

110. On January 30, 2021, the Court dismissed Plaintiffs' Cause of Action 4. *See* Order re Motions to Dismiss and Request for Discovery (ECF No. 61) at 7. As a result, Zoosk has no obligation to respond to this paragraph.

PRAYER FOR RELIEF

No response is required to Plaintiffs' Prayer for Relief. To the extent a response to Plaintiffs' Request for Relief is required, Zoosk denies that Plaintiffs are entitled to the relief they seek.

AFFIRMATIVE DEFENSES

First Defense

Plaintiffs lack standing under Article III of the United States Constitution.

Second Defense

The damages suffered by Plaintiffs, if any, were caused by the acts of others for whose conduct Zoosk was not responsible, including but potentially not limited to the criminals who perpetrated the cyberattack, and for those actions Zoosk cannot be found liable.

Third Defense

Plaintiffs' negligence claim is barred because Zoosk's Terms of Use, of which Plaintiffs received notice and to which Plaintiffs assented, contains a limitation of liability provision excluding relief on a negligence claim for any and all of the damages and injuries claimed by Plaintiffs in their negligence claim.

Fourth Defense

Plaintiffs' negligence claim is barred both by the merger clause in the Terms of Use, of which Plaintiffs received notice and to which Plaintiffs assented, and by the warranty disclaimer in the Terms of Use insofar as the negligence claim is based on any Zoosk representation, warranty, or promise not expressly contained in the Terms of Use.

//

Fifth Defense

Plaintiffs' negligence claim is barred because Plaintiffs did not suffer any damages or injuries that were caused by an act or omission of Zoosk.

Sixth Defense

Plaintiffs' negligence claim is barred, in whole or in part, by a lack of actual or proximate cause.

Seventh Defense

Plaintiffs' negligence claim is barred because Zoosk does not owe a common-law or statutory duty of care to Plaintiffs to protect against third-party criminal attack any information Plaintiffs may have provided to Zoosk in connection with their becoming or being Zoosk users.

Eighth Defense

Plaintiffs' negligence claim is barred by the economic loss doctrine.

Ninth Defense

Plaintiffs' negligence claim is barred because Plaintiffs' alleged damages, if any, were not reasonably foreseeable.

Tenth Defense

Plaintiffs have suffered no recoverable damages.

Eleventh Defense

To the extent Plaintiffs have suffered any recoverable damages, such damages are limited to \$50 per person by the limitation of liability provision in the Terms of Use, of which Plaintiffs received notice and to which Plaintiffs assented.

Twelfth Defense

Plaintiffs' damages claims are barred to the extent they have failed to take steps to mitigate their alleged damages.

Thirteenth Defense

Plaintiffs' damages claims are barred to the extent any steps they may have taken to mitigate their alleged damages were unreasonable.

Fourteenth Defense

Plaintiffs' damages claims are barred to the extent Plaintiffs were contributorily negligent with respect to any damages they claim to have incurred.

Fifteenth Defense

Plaintiffs have suffered no legally cognizable injuries that are actionable in negligence under applicable law.

Sixteenth Defense

Plaintiffs' declaratory judgment claim fails because declaratory judgment is a form of relief, not a claim, and thus fails to the extent Plaintiffs' negligence claim fails.

Seventeenth Defense

Plaintiffs' declaratory judgment claim fails because Plaintiffs do not face a continued risk of harm.

Eighteenth Defense

Plaintiffs' declaratory judgment claim fails because Plaintiffs cannot establish the prerequisites to declaratory judgment relief set forth in Federal Rule of Civil Procedure 57, 28 USC § 2201, and the case law decided under those provisions.

Nineteenth Defense

Plaintiffs' claims may not properly be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Twentieth Defense

Plaintiffs' claims may not properly be maintained as a class action because by means of the Zoosk Terms of Use, of which Plaintiffs had notice and to which Plaintiffs assented, each Plaintiff agreed that any and all claims brought by him or her against Zoosk must be brought in his or her individual capacity and not as a plaintiff in a class action. By such agreement each Plaintiff waived any right he or she might otherwise have had to bring this action as a class action.

//

//

Twenty-First Defense

Plaintiffs' claims are barred for failure to comply with the pre-litigation dispute resolution requirement of the Terms of Use, of which Plaintiffs had notice and to which Plaintiffs assented.

Twenty-Second Defense

Plaintiffs' claims may not properly be tried to a jury because the Terms of Use, of which Plaintiffs had notice and to which Plaintiffs assented, waived trial by jury and because Plaintiff's negligence claim is, in any event, not triable to a jury insofar as Plaintiffs seek only equitable and/or declaratory relief.

//

//

Reservation of Rights

Zoosk reserve the right to amend this Answer or to assert other defenses as this action proceeds. In particular, but without limitation, in the event this action is certified as a class action, Zoosk reserves the right to amend this Answer to assert defenses that may be available under the law applicable to the claims of any class member. Based on all of the foregoing as well as other grounds, Zoosk denies that Plaintiffs are entitled to any relief whatsoever.

1 Dated: February 16, 2021

Respectfully Submitted,

2 /s/ Douglas H. Meal

3 Douglas H. Meal (*admitted pro hac vice*)

4 MA Bar No. 340971

ORRICK, HERRINGTON & SUTCLIFFE LLP

222 Berkeley St., Suite 2000

5 Boston, MA 02116

6 dmeal@orrick.com

7 Rebecca Harlow

8 CA Bar No. 281931

ORRICK, HERRINGTON & SUTCLIFFE LLP

405 Howard Street

9 San Francisco, CA 94105

10 rharlow@orrick.com

11 *Attorneys for Defendants*

12 *Zoosk Inc. and Spark Networks SE*